Feb 28 2000

(20)

No. 99-699

Supreme Court, U.S.
FILED
FEB 28 2000
CLERK

IN THE

Supreme Court of the United States

BOY SCOUTS OF AMERICA and MONMOUTH COUNCIL, BOY SCOUTS OF AMERICA,

Petitioners,

v.

JAMES DALE,

Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF OF NATIONAL CATHOLIC COMMITTEE ON SCOUTING, GENERAL COMMISSION ON UNITED METHODIST MEN OF THE UNITED METHODIST CHURCH, THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS, THE LUTHERAN CHURCH-MISSOURI SYNOD, AND THE NATIONAL COUNCIL OF YOUNG ISRAEL AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

VON G. KEETCH
Counsel of Record
ALEXANDER DUSHKU
KIRTON & MCCONKIE
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
(801) 328-3600
Attorneys for Amici

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D.C. 20001

35pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF THE *AMICI CURIAE*	1
SUMMARY OF THE ARGUMENT	3
ARGUMENT	5
I. WITH THE FULL INVOLVEMENT OF CHURCHES AND SYNAGOGUES, SCOUTING IN AMERICA WAS FOUNDED AS A MOVEMENT TO TEACH AND INSTILL IN BOYS A SPECIFIC SET OF MORAL PRECEPTS AND CHARACTER TRAITS	5
A. The Birth of the Scouting Movement: The British Vision of Scouting	6
B. The Scouting Movement in America: Religion at the Fore	9
II. SCOUTING CONTINUES TO BE AN EXPRESSIVE, VALUE-INCULCATING MOVEMENT THAT MANY CHURCHES AND SYNAGOGUES HAVE ADOPTED AS A MEANS OF YOUTH MINISTRY	14
A. Today's Scouting Continues the Tradition of Character Education	14
B. Scouting Promotes an Affirmative Vision of What a Man Should Be	16
C. Scout Patrols and Troops are Intimate, Expressive, and Value-Inculcating Associations Where Adult Scout Leaders Guide the Development of Impressionable Boys	17
D. Churches and Synagogues Presently Sponsor the Majority of Scout Troops Nationwide and Almost Half of Those in New Jersey, Infusing Scouting's Religious Themes and Character Training With Meaning That Is Specific to Their Particular Religious Traditions	20

TABLE OF CONTENTS—Continued

Page

III. COERCING BOY SCOUTS OF AMERICA TO INSTALL OPENLY HOMOSEXUAL SCOUT LEADERS VIOLATES THE FIRST AMENDMENT 23

CONCLUSION 30

TABLE OF AUTHORITIES

CASES Page

Board of Directors of Rotary International v. Rotary Club of Duarte, 481 U.S. 537 (1987) 25
Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc., 515 U.S. 566 (1995) 24, 27
Jones v. Wolf, 443 U.S. 595 (1979) 27
Kedroff v. St. Nicholas Cathedral, 344 U.S. 94 (1952) 5
NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 23
New York State Club Ass'n v. City of New York, 487 U.S. 1 (1988) 25
Randall v. Orange County Council, 17 Cal. 4th 736, 952 P.2d 261 (1998) 15, 27
Roberts v. United States Jaycees, 468 U.S. 609 (1984) 5, 20, 24, 25, 29
Serbian Eastern Orthodox Diocese v. Milivojevich, 426 U.S. 696 (1976) 26
Watson v. Jones, 80 U.S. (13 Wall.) 679 (1871) 27
Welsh v. Boy Scouts of America, 993 F.2d 1267 (7th Cir. 1993) 27
Widmar v. Vincent, 454 U.S. 263 (1981) 26

STATUTES

N.J. Stat. Ann. §§ 10:5-1 to -49 (West 1993) 5
29 U.S.C. §§ 151 to 169 30

MISCELLANEOUS

Acts 6:6 (King James) 22
ROBERT BADEN-POWELL, SCOUTING FOR BOYS (22nd ed. 1944) 7, 8
BOY SCOUTS OF AMERICA, THE BOY SCOUT HANDBOOK (10th ed. 1990) 10-12, 14, 15, 17, 18
BOY SCOUTS OF AMERICA, THE BOY SCOUT HANDBOOK (11th ed. 1998) 11, 12, 14, 15, 19
Boy Scouts of America, *Foundations for Selecting Unit Leaders* (BSA pamphlet) 20
Virgil Burke, *Redefining Your Troop's Religious Program*, SCOUTER MAGAZINE, vol. 1, issue 6 (ca. 1999) 15

TABLE OF AUTHORITIES—Continued

	Page
CHARTER AND BYLAWS OF THE BOY SCOUTS OF AMERICA, art. IX, § 1, cl. 1 (Declaration of Religious Principle) (Sept. 1998)	13
GBCS Communications, *Some Frequently Asked Questions about GBCS* (visited Feb. 24, 2000) <http://www.umc-gbcs.org/faqgbes.htm>	2
Terry Howerton, *Our Mission*, SCOUTER MAGAZINE, vol. 1, issue 6 (ca. 1999)	19
ROBERT H. MACDONALD, SONS OF THE EMPIRE (1993)	8
ANCORA E. MILANO, FOOTSTEPS OF THE FOUNDER (1984)	9
WILLIAM D. MURRAY, THE HISTORY OF THE BOY SCOUTS OF AMERICA (1937)	4, 8-13, 18
MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS (1991)	29
Psalms 4:3 (King James)	22
MICHAEL ROSENTHAL, THE CHARACTER FACTORY: BADEN-POWELL AND THE ORIGINS OF THE BOY SCOUT MOVEMENT (1986)	6-9
ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer ed. & George Lawrence trans., Harper-Perennial 1969) (1835)	27-29

INTEREST OF THE *AMICI CURIAE*

Among all of Scouting's supporters, there are none more important to Boy Scouts of America ("BSA") than *amici*.[1] The organizations joining in this brief are by far the largest religious sponsors of Scouting in America. Religious institutions charter over 60% of all Scouting units in the United States. Of these, a full two-thirds are chartered by *amici*. Nationally, *amici* sponsor over 50,000 Scouting units and almost 1.2 million scouts, with over 20,000 scouts in New Jersey alone.

For many decades *amici* have employed Scouting as a tool of religious ministry, making Scouting an integral part of their youth programs. The right of BSA and its sponsoring organizations to determine eligibility requirements for scout leaders is therefore of paramount importance, directly impacting the ability of these *amici* to organize and control their Scouting programs.

1. *Amicus* National Catholic Committee on Scouting ("NCCS") oversees the Catholic Church's Scouting ministry in the United States. The purpose of the NCCS is to utilize and ensure the constructive use of the Scouting program as a viable form of youth ministry within the Catholic Church. Nationwide, the Catholic Church sponsors over 355,000 scouts and almost 10,000 Scouting units (troops and packs), making it the third largest sponsor of Scouting units among religious institutions in the United States. In New Jersey, the Catholic Church is the largest religious supporter of Scouting, sponsoring over 14,000 scouts and about 370 Scouting units.

2. *Amicus* General Commission on United Methodist Men of The United Methodist Church ("United

---

[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* state that they authored this brief in whole, and that no person or entity, other than *amici*, made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

Methodist Men") is the church-wide organization within The United Methodist Church authorized to oversee and coordinate the denomination's Scouting ministries. It carries out these responsibilities through the Office of Scouting Ministries, whose National Director reports directly to the General Secretary of the United Methodist Men. In this brief, the United Methodist Men speaks for the Office of Scouting Ministries. Nationwide, The United Methodist Church sponsors over 424,000 scouts and almost 12,000 Scouting units, making it the largest single sponsor of individual scouts and the second largest sponsor of Scouting units in the United States. In New Jersey, The United Methodist Church sponsors over 8,000 scouts and almost 200 Scouting units.

Another Methodist organization—the General Board of Church and Society (the "GBCS")—joined an *amici curiae* brief in opposition to the Petition for Writ of Certiorari and may file an *amicus* brief on the merits in support of James Dale. To clarify, the GBCS neither oversees nor manages Scouting in The United Methodist Church. The GBCS's principal focus is social and political advocacy on behalf of a variety of issues. The GBCS does not speak for the Church's Office of Scouting Ministries.[2]

---

[2] The prime responsibility of the GBCS is to seek the implementation in society of the Social Principles of The United Methodist Church. According to the GBCS's website, the major issues GBCS works on are: "Environmental justice issues such as endangered species and genetic science; Social and economic justice concerns such as gambling and campaign finance reform; Peace with justice issues such as immigration and military spending; Women's issues, reproductive rights, human sexuality; Civil and human rights such as the death penalty and gun control; Health care issues such as mental illness and HIV/AIDS; Children, youth and family concerns such as welfare reform and public education." GBCS Communications, *Some Frequently Asked Questions about GBCS* (visited Feb. 24, 2000) <http://www.umc-gbcs.org/faqgbes.htm>. Neither the United Methodist Men nor the GBCS speaks for the entire denomination. That right belongs exclusively to the Church's General Conference.

3. *Amicus* The Church of Jesus Christ of Latter-day Saints sponsors over 400,000 scouts and over 30,000 Scouting units nationwide, making it the largest single sponsor of Scouting units in the United States. In New Jersey, The Church of Jesus Christ of Latter-day Saints sponsors over 700 scouts and about 60 units.

4. *Amicus* Lutheran Church-Missouri Synod sponsors approximately 1,000 Scouting units nationwide, including units in New Jersey.

5. *Amicus* National Council of Young Israel sponsors a number of Scouting units nationwide.

SUMMARY OF THE ARGUMENT

Scouting is a social movement that exists to instill in boys the character traits and religious values that BSA and its sponsors believe necessary for honorable manhood. Religious organizations such as *amici* have long been the prime sponsors of the Scouting Movement. America's churches and synagogues charter tens of thousands of Scouting units across the nation, selecting and training thousands of adult scout leaders every year according to BSA standards and their own religiously informed criteria. For many religious organizations, and especially these *amici*, the Scouting program is a means of youth ministry. By selecting adult leaders who uphold and exemplify Scouting's ideals, BSA and its sponsors ensure that the message of Scouting is properly taught and modeled to impressionable boys. The decision of the New Jersey Supreme Court would force BSA to appoint as the bearers and prime inculcators of its message persons who do not believe in or uphold Scouting's fundamental values. The First Amendment rights of free speech and free association preclude the government from requiring such a result.

"Those who established Scouting in America deliberately planned to promote Scouting as a Movement . . . ." WILLIAM D. MURRAY, THE HISTORY OF THE BOY SCOUTS OF AMERICA 514 (193 . From its inception, Scouting has indeed been a character movement dedicated to teaching and inculcating particular moral and religious values. Religious principles are a fundamental element of the Scouting Movement's program of character education; themes such as "duty to God" are part of Scouting's most basic creeds. Moreover, for over nine decades, America's churches and synagogues have provided overwhelming support to Scouting, effectively becoming the backbone of the movement. Religious organizations now sponsor the great majority of Scouting units in America. Although Scouting is broader than any single religion, the Scouting Movement complements the spiritual efforts of churches and synagogues. Many religious organizations (and certainly *amici*) support the Scouting Movement as a vehicle for youth ministry. At the same time, sponsorship by religious organizations has enabled the Scouting Movement to expand and increase its influence on this nation's boys. The Scouting Movement and organized religion are deeply (and productively) intertwined.

Scouting's principles are instilled in boys primarily through adult scout leaders, especially scoutmasters. The criteria for selecting such leaders are, therefore, absolutely essential to the movement. Scoutmasters exist not only to espouse the ideals of Scouting, but more importantly to live and embody them; they are the role models of the Scouting Movement. Further, religious organizations often expect their adult scout leaders to uphold and exemplify the ideals of their particular religions. Scouting's program for character development is effective precisely because it teaches through both precept and the concrete examples of its adult leaders. The success and very nature of the

movement are directly dependent on BSA's right to determine who will teach and model its ideals.

The failure of the court below to take adequate account of the nature of the Scouting Movement drove its erroneous decision not to afford First Amendment protection to BSA's membership and leadership criteria. Stepping back from doctrinal intricacies, the very notion of government having the power to regulate the selection of youth leaders in private, value-inculcating organizations like Scouting is directly contrary to the purpose of the First Amendment. Much like the prohibition against governmental interference with the selection of clergy, *see Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94 (1952), such organizations have always had the freedom to choose their own members and leaders. Throughout our history, that right has been "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984). As interpreted by the court below, New Jersey's Law Against Discrimination ("LAD"), N.J. Stat. Ann. §§ 10:5-1 to -49 (West 1993), directly abridges that fundamental right, and thus is unconstitutional. The decision below should be reversed.

ARGUMENT

I. WITH THE FULL INVOLVEMENT OF CHURCHES AND SYNAGOGUES, SCOUTING IN AMERICA WAS FOUNDED AS A MOVEMENT TO TEACH AND INSTILL IN BOYS A SPECIFIC SET OF MORAL PRECEPTS AND CHARACTER TRAITS.

The decision below proceeds from a basic misunderstanding of the nature of the Scouting Movement—or at a minimum, from a failure to appreciate the constitutional implications of what Scouting truly is. For the Supreme Court of New Jersey, Scouting is apparently little more than a recreational program for any interested youth,

much like Little League. (*See* 20a-24a.) Based on this extremely truncated view, the court held that BSA is a place of public accommodation under New Jersey law. (*See* 31a.) The interpretation of New Jersey law is, of course, the prerogative of the Supreme Court of New Jersey. However, this Court is not bound by the inability or unwillingness of the court below to properly apprehend the nature of the Scouting Movement. With the full involvement of churches and synagogues, Scouting in America was founded as a movement to teach and instill in boys particular moral precepts and character traits.

A. The Birth of the Scouting Movement: The British Vision of Scouting.

"You cannot maintain an A-1 Empire on C-3 men," Lt. General (later Lord) Robert Baden-Powell was fond of saying, borrowing a line from Lloyd George. MICHAEL ROSENTHAL, THE CHARACTER FACTORY: BADEN-POWELL AND THE ORIGINS OF THE BOY SCOUT MOVEMENT 3 (1986). In Edwardian Great Britain at the dawn of the 20th century, with the trauma of the Boer War (1899-1902) still fresh, many socially conscious persons agreed, and were deeply concerned:

> Britain suddenly looked around to find itself inundated with physically deficient men with pigeon chests, bad teeth, flat feet, and slack wills, lacking the passionate loyalty to British ideals that had helped to extend the empire over so much of the world's surface. . . . The stout yeomen of yesteryear, on whom Britain had always seemed to depend in times of crisis, appeared upon examination to be mere memories of a grander time.
>
> How could Britain hope to compete with the evolving industrial threat of other countries—not to speak

> of the possible military threats to its empire—with a race of morally and physically inferior men?

Id.

Back from the war in South Africa, Baden-Powell had an answer to the perceived moral and physical anemia of the British male and the threat it posed to the well-being of the nation. According to Baden-Powell, many of the gravest problems afflicting Britain's men stemmed from lack of vigorous character education. *See id.* at 5. His remedy was Scouting.

Baden-Powell believed that "Scout training, rightly understood and liberally applied, could bring about the regeneration of the [British] nation." *Id.* at 6. Scouting "aims for a different point than is possible in the average school training," Baden-Powell wrote in a retrospective preface to his seminal 1908 work, SCOUTING FOR BOYS. "It aims to teach the boys how to live, not merely how to make a living." ROBERT BADEN-POWELL, SCOUTING FOR BOYS 19 (22nd ed. 1944). In short, Scouting was to be no mere social club but rather, in Baden-Powell's stark term, a "character factory." ROSENTHAL, *supra*, at 6 (quoting Baden-Powell).

Creating a program to help suppress the narrow desires of the self and inculcate a powerful sense of social and religious duty was key to Baden-Powell's nascent character factory. Baden-Powell believed selfishness was a danger to the interests of the nation and community and thus a character flaw to be remedied. "Therefore the aim of Scout training," Baden-Powell wrote, "is to replace Self with Service, to make lads individually efficient, morally and physically[,] with the object of using that efficiency for the service of the community." BADEN-POWELL, *supra*, at 20. In this, Baden-Powell saw himself espousing practical religion: "In other words, we aim for the practice of [religion] in [the scout's] everyday life and deal-

ings, and not merely the profession of its theology on Sundays." *Id.* at 20. As one historian has noted, "the subordination of the individual will to the interests of the community" was of "prime importance" to Baden-Powell and the Scouting Movement. ROBERT H. MACDONALD, SONS OF THE EMPIRE 158 (1993) (internal quotation marks omitted). The Scouting Movement sought to replace "the selfish" and "the self-indulgent" with a sense of duty to God, country, and the common good. *Id.* at 164-65.

Scouting's founders believed boys needed to learn obedience and discipline if they were to overcome the self and serve the common good. "For Baden-Powell and the others [in the early British Scouting Movement], the basis of good character and good citizenship . . . was a firm sense of discipline." ROSENTHAL, *supra*, at 8. "[T]he morality of the Scout was centered in personal conduct, in behaving honorably, in being loyal to friends, and in obeying exactly the rules of the movement." MACDONALD, *supra*, at 160. Today's "do your own thing" individualism was utterly alien to the founding of Scouting. Obedience to moral precepts and sacrifice for the greater good were the crucial guiding lights. *See id.* at 148.

From the outset, religion was an essential element of the Scouting Movement's program of character formation. Baden-Powell "submitted his scheme of Scouting for boys to the great leaders of the day" for their approval and support, and found enthusiastic acceptance. MURRAY, *supra*, at 501. Scouting's mission was to make boys into good men, and Baden-Powell was convinced that for a man to be good he must "believe[] in God and obey[] His laws." *Id.* at 500. He insisted that "every Scout should have a religion." *Id.* In his first address in America, Baden-Powell extolled the importance of religion to

Scouting: "We surely expect of every boy that he shall have some form or other of religion, and that he shall practice what he preaches." *Id.* at 501. Indeed, for Baden-Powell it made no sense to speak of a "religious side" of Scouting because the entire movement was based on religion: "There is no religious side of the movement. The whole of it is based on religion, that is, on the realization and service of God." ANCORA E. MILANO, FOOTSTEPS OF THE FOUNDER 108 (1984) (quoting Baden Powell from the periodical *Headquarters Gazette* (Nov. 1920)).

A comprehensive history of the aims and hopes of Scouting's British founders is well beyond the scope of this brief. The point *amici* wish to establish—a point that seems to have been lost on the court below—is that from its inception Scouting has been far more than a recreational club for boys. Scouting was a movement to turn boys into men of character. Michael Rosenthal is essentially correct that Scouting was to be a way of life:

> What Baden-Powell had in mind was never a simple set of rules and games but rather a coherent, self-contained system of education intended to shape the entire life of the boy . . . . In its ideal embodiment Scouting was not just an organization a boy joined but a total ideology that he absorbed and that thereafter determined his thinking, feeling and acting.

ROSENTHAL, *supra*, at 10.

B. The Scouting Movement in America: Religion at the Fore.

Like their British counterparts, socially conscious Americans of the time were concerned about the character of their young men. Thus, Americans greeted the Scouting program with tremendous excitement. Many viewed Scouting as filling a void in the youth programs of the day. *See* MURRAY, *supra*, at 22.

British Scouting could not be adopted wholesale in America, however. The nature of the two countries was different; for one, America was not trying to save a crumbling empire. Therefore, while maintaining Scouting's sharp focus on character training, America's Scouting founders adapted Scouting to suit the unique needs and temperament of America and America's boys.

In 1910, a set of by-laws was adopted for the newly organized Boy Scouts of America. The by-laws included a broad statement of the purpose of American Scouting:

> The object of the Boy Scouts of America is to organize the boys of the District of Columbia and elsewhere in the United States into units, and to teach them or cause them to be taught through duly designated leaders, discipline, patriotism, courage, habits of preservation and self control and ability to care for themselves in all exigencies of life.

Id. at 41. This statement is short; no attempt was made to include the many specifics of Scouting's character-building program. Yet it makes perfectly clear that from its inception the purpose of Scouting in America, like its cousin in Britain, has been the inculcation of specific character traits. As with British Scouting, this was to be no mere social group.

The Scouting Movement in America has long "declare[d] the necessity of religion in character development and urge[d] its practice." *Id.* at 509. In fact, religion has played an even more prominent role in American Scouting than in its British counterpart. This can be seen, for instance, in the revisions American Scouting made to the British Scout Law and Oath and in the inclusion in its constitution of an article pronouncing the necessity of religion to character development.

The Scout Law is the fundamental creed of the Scouting Movement. *See, e.g.*, BOYS SCOUTS OF AMERICA, THE BOY SCOUT HANDBOOK 553 (10th ed. 1990) [hereinafter "Handbook-10th"].[3] It is therefore indicative of the emphasis American Scouting placed on religion that it modified the British version of the Scout Law to add a new provision, the Twelfth Scout Law: "A Scout is Reverent. He is reverent toward God. He is faithful in his religious duties, and respects the convictions of others in matters of custom and religion." MURRAY, *supra*, at 63.[4] The Chief Scout Executive at the time explained the reason for this change, highlighting the vital importance of religion to the American Scouting Movement:

> We took the nine English Laws [of Scouting] and analyzed each one of them. We had before us recommendations, including some fifty laws . . . . My judgment of the Twelfth Scout Law is that it is one of the very finest things in the whole scheme of Scouting and one of the reasons we have had such outstanding success. . . . I felt at that time, as I feel now, that there is nothing more essential in the education of youth in America than to give them religious instruction and I advocated that this be included in the Twelfth Scout Law . . . . [Y]ou will find that the basis for instructing the youth of America is first, reverence toward God; second, faithfulness in their own religious duties in accordance with their own religious convictions; and third, which is essential to democracy, is that we respect the convictions of others in matters of custom and religion.

Id. at 54-55.

---

[3] *The Boy Scout Handbook* states that "[t]he Scout Law is a statement of facts: 'A Scout is trustworthy . . . loyal . . . helpful . . . friendly . . . courteous . . . kind . . . obedient . . . cheerful . . . thrifty . . . brave . . . clean . . . reverent.'" Handbook—10th at 553.

[4] This language has since been slightly modified. The last sentence was made into two sentences conveying the same message: "He is faithful in his religious duties. He respects the beliefs of others." BOY SCOUTS OF AMERICA, THE BOY SCOUT HANDBOOK 55 (11th ed. 1998) [hereinafter "Handbook—11th"].

Revisions to the Scout Oath, which already in its British form had a "duty to God" component, further imbued American Scouting with religious and moral themes. The American version added a new promise: "To keep myself physically strong, mentally awake, and morally straight"—an explicit focus on the character of the whole boy, "body, mind and spirit." MURRAY, *supra*, at 56.[5] In Scouting, to be "morally straight" is "[t]o be a person of strong moral character," one who guides his life with "honesty, purity, and justice" and is "clear in [his] speech and actions, and faithful in his religious beliefs." Handbook-10th at 551.

The "duty to God" requirement was also made part of the official constitution of Scouting. Article III of BSA's original constitution affirmed: "The Boy Scouts of America maintains that no boy can grow into the best kind of citizenship without recognizing his obligation to God," and that "[t]he recognition of God as the ruling and leading power in the universe, and the grateful acknowledgment of His favors and blessings, are necessary to the best type of citizenship, and are wholesome things in the education of the growing boy." MURRAY, *supra*, at 499. These same principles are to this day essential guideposts for the Scouting Movement in America.[6]

---

[5] The Scout Oath states: "On my honor I will do my best to do my duty to God and my country and to obey the Scout Law; to help other people at all times; to keep myself physically strong, mentally awake, and morally straight." Handbook—11th at 9.

[6] BSA's current charter and bylaws provide:

> The Boy Scouts of America maintains that no member can grow into the best kind of citizen without recognizing an obligation to God. In the first part of the Scout Oath or Promise the member declares, "On my Honor I will do my best to do my duty to God and my country and to obey the Scout Law." The recognition of God as the ruling and leading power in the universe and the grateful acknowledgment of His favors and blessings are necessary to the best type of citizenship and are wholesome precepts in the education of the growing members. No matter what the religious faith of the members may be, this fundamental need of good citizenship should be kept before them. The Boy Scouts of America, therefore, recognizes the religious element in the training of the members, but it is absolutely non-sectarian in its attitude toward that religious training. Its policy is that the home and the organization or group with which the member is connected shall give definite attention to religious life.

CHARTER AND BYLAWS OF THE BOY SCOUTS OF AMERICA, art. IX, § 1, cl. 1 (Declaration of Religious Principle) (Sept. 1998).

However critical religion may be to the Scouting Movement, Boy Scouts of America has never presumed to be the font of the specific tenets of religious education. For that, Scouting's founders turned to America's churches and synagogues. An official history of Scouting in America explains that "[i]t is the genius of the Boy Scout Movement that . . . in order to accomplish its purpose in service to the boy, it must submerge itself in the parent institutions which administer its units. It is only on this basis that Scouting has been useful to the Church in its program of religious education." MURRAY, *supra*, at 508. "[R]ecogniz[ing] the essential part that religion must play in character building," *id.*, Scouting's American founders sought the sponsorship of America's churches and synagogues to create a Scouting experience that, while tolerant of religious diversity, would nonetheless have specific religious content.

Because of Scouting's devotion to the spiritual element of character education, and its willingness to submerge itself in the religious traditions of its sponsors, America's churches and synagogues enthusiastically embraced Scouting. The long history of religious support for Scouting cannot be related here. Suffice it to say that "Scouting in America has received almost universal acceptance and cooperation among the religious forces of our country," *Id.* at 515, making the "Church or Synagogue" "the outstanding and predominating sponsoring institution" of the Scouting Movement. *Id.* at 510. For many decades, BSA

and America's religious organizations have been in an extremely close and mutually beneficial partnership to inculcate moral values in boys. As explained below, that partnership continues to this day, though it is contingent on the Scouting Movement's adhering to the moral teachings it was created to champion.

II. SCOUTING CONTINUES TO BE AN EXPRESSIVE, VALUE-INCULCATING MOVEMENT THAT MANY CHURCHES AND SYNAGOGUES HAVE ADOPTED AS A MEANS OF YOUTH MINISTRY.

With the indispensable assistance of churches and synagogues, Scouting remains a character movement dedicated to molding boys into upstanding men.

A. Today's Scouting Continues the Tradition of Character Education.

Scouting's emphasis on character education is as strong now as ever. After almost nine decades, the Scout Law and Scout Oath are still the bedrock statements of the ideals to which each scout should aspire. "The Scout Law is the foundation of Scouting," declares the most recent version of *The Boy Scout Handbook*. Handbook-11th at 47. "Use the Scout Law," it enjoins, "to guide your actions when you are alone . . . ." *Id.* "The Scout Law will show you how to live as a boy and as a man." *Id.* The Scout Law continues to define who and what a scout is—and conversely the type of boy who is *not* a scout. "By doing all you can to live up to the Scout Law, you are a Scout. If you should willfully break the Scout Law, you violate the spirit of Scouting." Handbook-10th at 553. Through the Scout Oath, obedience to the Scout Law is affirmed by a solemn vow taken upon the boy's sacred "honor."

Duty to God remains a powerful and indispensable doctrine in Scouting. Elaborating on the "duty to God" section of the Scout Oath, the tenth edition (1990) of the Handbook explains that "[y]our family and religious leaders teach you to know and love God and the ways in which God can be served. As a Scout, you do your duty to God by following the wisdom of those teachings in your daily life . . . ." Handbook-10th at 550; *see also* Handbook-11th at 45 (affirming the same themes). The duty to God requirement in Scouting is not mere lip service to religious devotion.[7] A boy who is unwilling to affirm his duty to God cannot be a scout. *See Randall v. Orange County Council*, 17 Cal. 4th 736, 952 P.2d 261 (1998) (upholding decision by local BSA council not to allow an atheist to be a scout).

Scouting's teachings on sexuality have always affirmed traditional Judeo-Christian morality, centering on the importance of a boy someday becoming a responsible and loving husband and father within the traditional family structure. The *Handbook* teaches that when a scout is "fully grown" and has "become secure in [himself] and in [his] relationship" with a woman, he "may decide to marry and have a child." Handbook-11th at 376. But it also warns about the "feelings of guilt and loss" that premarital sexual relations can cause, advising that "[a]bstinence until marriage is a very wise course of action." *Id.*

As detailed more fully in BSA's brief on the merits, Scouting views homosexual conduct as inconsistent with its fundamental moral code. This position is consistent

---

[7] For example, a recent article in a prominent independent Scouting periodical reminds adult leaders to make sure to emphasize the religious elements of Scouting:

> Duty to God and Reverence for God were not afterthoughts or add-ons in the Scouting program. They were foundational elements in the mind of Baden-Powell from the very first. They should not be afterthoughts or add-ons in the program of today's [troops] either. The 12th Point of the Scout Law [regarding reverence before God] should be given at least as much emphasis in the day to day program as knots, hiking, or campouts.

Virgil Burke, *Redefining Your Troop's Religious Program*, SCOUTER MAGAZINE, vol. 1, issue 6 at 24 (ca. 1999).

with the broader religious teachings about sexuality espoused by Scouting's major religious sponsors.[8] *Amici* all share a common, firmly held belief that sexual relations should occur only within the bonds of marriage. They believe and teach that extra-marital sex is sinful, and that one who engages therein is not qualified to lead impressionable youth. *Amici*'s view of extra-marital sexual relations remains the same whether the specific sexual acts are homosexual or heterosexual. BSA and *amici* share the view that for men the good of sexual intimacy is inextricably bound to being a faithful husband and loving father.

B. Scouting Promotes an Affirmative Vision of What a Man Should Be.

The Scouting Movement advocates and instills in its members an affirmative vision of what a man should be. In all its teachings, requirements, and activities, Scouting strives to mold naturally selfish boys into selfless men of duty to God, family, and country. Scouting's road to true manhood entails finding oneself through losing oneself in the service of higher principles and others. Scouting teaches a boy to sacrifice his own desires and to become a better person for the greater good; to keep his word; to be a leader to whom others can look for help and guidance; to be upbeat and courageous in the face of adversity; to be prudent in his expenditures; to respect the culture and beliefs of others even as he is true to his own faith; to submit to just authority; and to be morally up-

[8] The religious organizations that filed an *amici curiae* brief opposing BSA at the petition stage, and which may also file a brief on the merits supporting Dale, represent a very small portion of the total number of religiously sponsored scouts and Scouting units in the United States. Their dissenting voices on this issue are valued within the movement, of course, but their influence in this regard is extremely limited. As with all sponsors, their continued involvement in the Scouting Movement is contingent upon their willingness to uphold—especially before the boys—BSA's membership and leadership criteria, even as they disagree.

right in his personal conduct—all that he may more effectively serve his God, family, and country.

Hence, Scouting trains boys not only to be successful in their chosen walk, but to choose the right path. The mission of Scouting is not to equip a boy to pursue all possible destinies, but to discipline his character for a better life of ennobling obligation. In sharp contrast to the popular ethos of "to thine own self be true," Scouting's Motto is "Do a good turn [for others] daily;" its Oath is to do one's "duty to God and . . . Country" and to remain "morally straight;" and its Law is obedience, physical and moral cleanliness, and reverence before God.

Admittedly, not all see the merit of the Scouting way. Some may think talk of character education is a cultural relic, while others, like Dale, even seek to use the force of government to remake Scouting in the image of their dissent. Nevertheless, the Scouting vision continues to be upheld and vigorously promoted by those, like *amici*, who still believe in the worth of its core ideals.

C. Scout Patrols and Troops Are Intimate, Expressive, and Value-Inculcating Associations Where Adult Scout Leaders Guide the Development of Impressionable Boys.

Scouting's values are taught and instilled most powerfully in its local patrols and troops under the leadership of adult scout leaders. Every scout is "a member of a patrol, which is a group of three to eight boys who enjoy Scouting together." Handbook-10th at 10. A patrol is an intimate association of boys united in a common cause. "As a member of a patrol," the *Handbook* tells the boy, "you are no longer alone." *Id.* at 535. "A patrol is a team of good friends working together to make things happen," each member "shar[ing] with the others" and "look[ing] out for one another." *Id.* Patrol members hike

together, explore together, cook meals together, sleep in common tents together, serve together, and learn and live together the ideals of Scouting. In many of the troops *amici* sponsor, patrol members also worship together.

"No patrol stands alone. Each is a part of a troop made up of a number of patrols." Handbook-10th at 542. The troop looks out for each patrol and its members. At the troop level, adult leaders oversee the development of the boys as they guide and direct Scouting activities, ensuring that each boy is in a patrol that meets his needs and encourages him to become a true scout.

In the intimacy of the patrol and troop settings, Scouting's principles are inculcated, modeled, and lived. The Scout Law and Oath are typically repeated at the beginning of each meeting, impressing their importance upon the boys' minds. In many of *amici's* troops, opening and closing prayers are offered to remind the boys of God's watchful presence and the seriousness of their religious obligations. Patrols and troops give the boys the opportunity to lead and be led, to instruct and be instructed, to help and be helped—all according to the Scouting way. "The troop acts as a framework within which [the boy] can develop as a Scout and a leader." *Id.* Throughout, the express "goal" is to help the boy become a "young man who lives by the Scout Oath and Law." *Id.* at 10.

As mentors, Scouting's adult leaders are vital to this process. "The safety of the [Scouting] Movement lies in its leadership . . . ." MURRAY, *supra*, at 36. Nowhere is this more true than at the local level where adult scout leaders interact with highly impressionable boys. Adult leaders are intended to be counselors to boys who are often confused and looking for answers to life's difficult questions. The *Handbook* tells scouts that they "will come to know [their Scoutmaster] as a wise friend to whom [they] can always turn for advice." Handbook-10th at 542. The *Handbook* encourages the scout to talk to

his scout leaders even about such extremely sensitive matters as sex:

> If you have questions about growing up, about relationships, or about *sex*, **ask**. Talk with your parents, religious leaders, teachers, or *Scoutmaster*. They want what is best for you. Let them know your concerns.

Handbook-11th at 377 (italics added; bolding in original).

Scouting's program for character development is successful because it teaches morality and character not only through lessons, creeds, and activities, but also through the living examples of its adult leaders.[9] An adult scout leader, such as a scoutmaster or assistant scoutmaster, has a duty to live and embody Scouting's ideals. *See* JA 445. In a very real sense, the scout leader is not merely the messenger of Scouting—he is also the message; in *amici's* many decades of experience, the two cannot be separated in the mind of the boy. Moreover, sponsoring religious organizations often expect their adult leaders to uphold in word and deed the teachings of their respective religions. Adult scout leaders, therefore, are powerful role models. They inculcate the message of Scouting less by what they say than by who they are and what they do. The success of the entire Scouting Movement depends on the criteria used for selecting adult leaders.[10] In Scouting, to change the messenger is literally to change the message.

---

[9] An article in a recent Scouting magazine puts the point this way:

> The [Scouting] Movement lives in the hearts and minds of all who have come into contact with it. But most of all, the Movement of Scouting can best be found in the mentoring relationship between a small group of adults and boys on a cold winter campout in the middle of nowhere.

Terry Howerton, *Our Mission*, SCOUTER MAGAZINE, vol. 1, issue 6 at 4 (ca. 1999).

[10] A BSA guide to chartering organizations for use in recruiting adult scout leaders stresses that "[t]he *most important* decision to

As adult leaders and boys participate in the Scouting program and remain faithful to its teachings, they become part of the Scouting narrative.[11] Within that narrative, the boy absorbs the principles of Scouting in real life situations. The Scouting narrative becomes for the boy a way of living that brings excitement, purpose, and structure to his life. He learns how to confront life's challenges because he knows what he is: a scout. Each Scouting unit has different boys and leaders and so naturally will have experiences unique to itself. The Scouting narrative varies in obvious and subtle ways depending on the circumstances. But because each unit affirms the basic teachings of Scouting, the narrative of each unit is infused with the same principles that have sustained the Scouting Movement in America for decades.

D. Churches and Synagogues Presently Sponsor the Majority of Scout Troops Nationwide and Almost Half of Those in New Jersey, Infusing Scouting's Religious Themes and Character Training With Meaning That Is Specific to Their Particular Religious Traditions.

Religion and the support of America's churches and synagogues have long been vital to Boy Scouts of America. Conversely, Scouting is also an extremely important part of the youth ministries of many of America's churches and synagogues, including those represented by

---

be made [by the organization] is providing the [Scouting] program with a selection of leaders who represent the values of Boy Scouts of America and your organization." Boy Scouts of America, *Foundations for Selecting Unit Leaders* (BSA pamphlet) (emphasis added). The most crucial criteria in selecting a scout leader are "Personal commitment to Scouting's mission" and "High moral standards," coming before even "Ability to relate to young people." *Id.*

11 *Cf. Roberts*, 468 U.S. at 633 (O'Connor, J., concurring) ("Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice.").

amici; a deeply symbiotic relationship exists between organized religion and BSA. Sponsorship by religious organizations imbues tens of thousands of Scouting units with both the general religious themes in the Scout Oath and Law and the particular religious beliefs of the sponsoring organizations.

At present, both nationally and in New Jersey, religious organizations sponsor over 60% of all Scouting units. JA 159. Of these, two thirds are sponsored by the churches and synagogues represented by *amici*. Through their overall support and dedication to Scouting—in recruiting young male members into the program, in evaluating and appointing adults to serve as leaders in Scouting units, in providing financial and spiritual support for those units, in developing Scouting's religious awards, in dedicating religious facilities for use in Scouting events, and in establishing Scouting traditions and other special programs important to their particular religions—sponsoring churches and synagogues infuse the nonsectarian structure of Scouting with meaning derived from their particular religious traditions. As such, each of the *amici* employs the Scouting program in somewhat different ways to further its own religious ends.

1. *Amicus* National Catholic Committee on Scouting ("NCCS") oversees Scouting in the Catholic Church. Scouting is an important part of the Catholic Church's pastoral efforts to take the Gospel message to both Catholic and non-Catholic youth. Under the guidance of ecclesiastical leaders, local Catholic committees on Scouting direct the Scouting ministries at the diocesan level. Ordained priests at times serve as scout leaders. The Catholic Church supports Scouting because its high ethics and God-focused programs provide a Christian setting that enables young people to cope with today's weakened moral standards and increased violence. Catholic

Scouting has also proved itself to be a time-honored means of shaping future Catholic leaders.

2. Scouting is likewise a substantial and indispensable aspect of the youth ministries of *amicus* General Commission on United Methodist Men of The United Methodist Church. The United Methodist Men employs Scouting's program of character education as part of its efforts to instill in boys of all faiths the basic principles of morality. United Methodist Scouting helps boys to have faith in God and to prepare for a life of Christian faith and witness. The pastor of each congregation sponsoring a Scouting unit is directly responsible for selecting qualified adult leaders and supervising Scouting activities. Such leaders must affirm and live Christian values.

3. *Amicus* The Church of Jesus Christ of Latter-day Saints uses Scouting as part of the activity program of its "Aaronic Priesthood," the lay priesthood held by all young men in the Church. Thus, although the Church welcomes nonmembers as full participants in its Scouting units, Scouting serves an important religious purpose. Scouting, including Cub Scouting, is an integral part of the priesthood training of LDS boys. The bishop of a Church congregation directly overseas Scouting, personally selecting (and releasing) the congregation's scout leaders in conformity with Church canons and his understanding of God's will. Only those who live in harmony with the teachings of the Church and Scouting are asked to serve as scout leaders. To provide divine approval to their Scouting ministries, senior priesthood officers typically "set apart" new scout leaders by the laying on of hands. *Cf. Psalms* 4:3 (King James); *Acts* 6:6 (King James).

4. Lutheran congregations have used the Scouting program for more than seventy years as a resource for Christian ministry to boys and their families. *Amicus* The Lutheran Church-Missouri Synod requires that its scout leaders promote the boys' loyalty to the Church, Christian faith and conduct, and responsible citizenship. It is the

duty of congregational leadership to provide Scouting units with motivation, guidance, and instruction compatible with the Holy Scriptures.

5. *Amicus* National Council of Young Israel and its local branch synagogues throughout the country have been using Scouting for over 30 years as an educational program for youth and their families. The rabbi and lay leadership of each congregation are heavily involved in choosing scout leaders who will be both role models and educators for the boys in proper Jewish faith and conduct. Each rabbi also oversees the teaching of the Scouting curriculum to ensure that proper information and ideals are passed on to the boys.

In brief, like many of BSA's religious sponsors, *amici* have integrated the Scouting program into their youth ministries as a means of instilling in boys and young men moral and religious values. When *amici* and their affiliated congregations select scout leaders, they are guided by BSA's general rules and also by the unique beliefs, doctrines, policies, and procedures of their respective religions. This is Scouting as it was envisioned by its earliest founders. To alter this vision is to alter Scouting itself.

III. COERCING BOY SCOUTS OF AMERICA TO INSTALL OPENLY HOMOSEXUAL SCOUT LEADERS VIOLATES THE FIRST AMENDMENT.

Adequate appreciation of the nature of the Scouting Movement—of its aims, methods, and principal sponsors—demonstrates why the government cannot regulate Scouting's membership and (especially) leadership-selection criteria. It is simply "beyond debate" that the "freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the [Constitution]." *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958). If that basic constitutional principle does not apply to the Scouting Movement, it is essentially meaningless.

BSA's brief on the merits ably sets forth why the First Amendment—especially under this Court's rulings in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston, Inc.*, 515 U.S. 566 (1995), and *Roberts*—precludes New Jersey from forcing BSA to install an openly homosexual male as a teacher and role model. Those doctrinal arguments will not be repeated here. Dale's arguments to the contrary are based on the narrowest and most hypertechnical interpretations of this Court's free speech and free association cases. A fair reading of those cases, however, can only lead to the conclusion that the decision below must be reversed. Several addtional points merit further emphasis:

1. The regulation at issue disrupts the message that BSA and its major religious sponsors desire to send about proper sexual conduct. As noted, Scouting "espouses family values" which emphasize marriage and fatherhood. *See* JA 697. Likewise, in their central tenets and beliefs, *amici* affirm that the good of sexual relations can be realized only in marriage, and that persons have a moral duty to limit their sexual activities accordingly. At times this message is taught expressly in the Scouting context, as when boys directly pose questions about sex to their scoutmasters. But most often it is taught implicitly through adult role models (often the fathers of boys in the troop) who simply live and embody the message, thereby setting an example and establishing a behavioral norm. To be coerced to install a scout leader who openly acknowledges his homosexuality would fundamentally disrupt the norm *amici* seek to instill in their impressionable youth. Yet that is precisely what the decision below would force BSA to do.[12]

---

12 It is no response that someone (unlike Dale) might be able to conceal his homosexual conduct, or that some other person might be able to hide his extra-marital affairs. The Scouting Movement cannot survive, much less accomplish, its mission, if its leaders live a double standard. Hypocrisy is lethal to character education. *See* JA 257 ("[P]ractice what you preach . . . . The most destructive influence on boys is adult inconsistency and hypocrisy.") (quoting *The Scoutmaster Handbook*).

2. The ruling below threatens to fracture the Scouting Movement, destroying or at least severely diminishing BSA's ability to advocate and inculcate its values. If the appointment of scout leaders cannot be limited to those who live and affirm the sexual standards of BSA and its religious sponsors, the Scouting Movement as now constituted will cease to exist. *Amicus* The Church of Jesus Christ of Latter-day Saints—the largest single sponsor of Scouting units in the United States—would withdraw from Scouting if it were compelled to accept openly homosexual scout leaders. The other *amici* would be forced to reevaluate their sponsorship of Scouting, with the serious possibility of reaching the same conclusion.

To be sure, the lower court's decision does not apply nationwide. Moreover, none of the *amici* has made a final decision as to how it might respond should the impact of the holding below be confined to New Jersey—whether to part company with Scouting altogether, to withdraw from Scouting just in New Jersey, or to take some other tack. But without doubt the rule established by the decision below threatens the existence of Scouting, at a minimum in New Jersey and probably throughout the United States. Given the extent of their support, losing any of these *amici* as sponsors, whether in New Jersey or nationwide, would seriously disrupt BSA's ability to express and inculcate its message. The destruction or dismemberment of an expressive organization is perhaps the ultimate abridgment of the right of expressive association. That possibility was never faced in *Roberts*, in *Board of Directors of Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), or in *New York State Club Ass'n v. City of New York*, 487 U.S. 1 (1988). It is very real here.

3. The regulation at issue would entangle the government in religion and abridge free exercise rights. Scouting is infused with religion. Religious precepts, like "duty to God" and "reverence" before God, are at the heart of Scouting's most fundamental creeds and are affirmed constantly in the intimacy of the troop setting—indeed, inculcating such values is a core purpose of Scouting. Institutionally, churches and synagogues are the preeminent sponsors and supporters of Scouting, and have been since its inception; *amici* alone charter roughly 1.2 million scouts and over 50,000 Scouting units.

Government cannot regulate Scouting without unconstitutionally entangling itself in religion, for the simple reason that Scouting and religion are themselves so deeply intertwined. Moreover, any attempt by the government to regulate scoutmaster selection decisions in the more than 60% of Scouting units sponsored by religious organizations would interfere directly with the right of churches and synagogues to govern their own ecclesiastical affairs. Although scout leaders are typically not formal members of the clergy, the appointment of a scout leader by a religious sponsor (a decision often made by ecclesiastical authorities) may well call for the same type of sensitivity and care, and may well be governed by the same sorts of ecclesiastical canons and policies, as the appointment of clergy. In any event, such decisions are inevitably bound up with religious beliefs, as discussed above. This Court has long held that such matters are beyond the power of government to regulate; government cannot entangle itself in decisions that are so permeated with religious considerations. *See Serbian Eastern Orthodox Diocese v. Milivojevich*, 426 U.S. 696, 710, 713-14 (1976) (government may not interfere with clergy selection); *Kedroff*, 344 U.S. at 116 (same); *cf. Widmar v. Vincent*, 454 U.S. 263, 284 (1981) (inquiry into significance of religious practices "would tend inevitably to entangle the State with religion in a manner forbidden by our cases");

Jones v. Wolf, 443 U.S. 595, 602-05 (1979) (no delving into religious doctrine); *see also Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29, 733-34 (1871).

4. The court below concluded that BSA's membership criteria are basically nonselective. (*See* 24a-31a.) In *amici's* experience, that is simply incorrect. Boys and adults who do not agree to live by Scouting's values cannot join *amici's* scout troops. *Cf. Welsh v. Boy Scouts of America*, 993 F.2d 1267, 1276-77 (7th Cir. 1993) (BSA membership criteria are "selective"); *Randall*, 952 P.2d at 266 (atheist excluded from Scouting). But whatever significance that conclusion may have under the LAD, it does nothing for Dale here. In *Hurley*, the fact that the parade organizers were "rather lenient in admitting participants" to the parade could not defeat their First Amendment rights. 515 U.S. at 569. "[A] private speaker does not forfeit constitutional protection by combining multifarious voices, or by failing to edit their themes to isolate an exact message . . . ." *Id.* at 570. Even assuming that BSA is nonselective, the same holds here.

5. Finally, this case calls for serious reflection on the importance and vulnerability of America's voluntary associations, *i.e.*, those social institutions that empower the individual by mediating between the totally private realm of personal and family life and the mega-institutions of the marketplace and government. The insightful observations and commentary in Alexis de Tocqueville's seminal work DEMOCRACY IN AMERICA provide a good starting point for such reflection. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA (J.P. Mayer ed. & George Lawrence trans., Harper-Perennial 1969) (1835). Visiting America from France in the early 1830's, Tocqueville marveled at the unique ability of Americans to form voluntary associations, and noted the tremendous social diversity such organizations enable:

> Americans of all ages, all stations in life, and all types of disposition are forever forming associations.

> There are not only commercial and industrial associations in which all take part, but others of a thousand different types—religious, moral, serious, futile, very general and very limited, immensely large and very minute. Americans combine to give fêtes, found seminaries, build churches, distribute books, and send missionaries to the antipodes. Hospitals, prisons, and schools take shape in that way. Finally, if they want to proclaim a truth or propagate some feeling by the encouragement of a great example, they form an association. In every case, at the head of any new undertaking, where in France you would find the government or in England some territorial magnate, in the United States you are sure to find an association.

Id. at 513.

More critically, Tocqueville also observed that the vitality of such associations is key to American democracy. The "intellectual and moral associations in America," he wrote, are "as necessary as [political and industrial associations] to the American people; perhaps more so." *Id.* at 517. The right to form and define voluntary associations encourages the virtues of self-governance and independence of action which are necessary for a democratic society. By allowing citizens with common concerns to unite and participate in the public square, associational liberty permits a healthy venting of social and religious passions; it empowers the individual to stand against majoritarian pressures for social conformity, protecting diverse voices in the nation; and it helps ensure adequate social and legal space for both the flourishing of new communities and the preservation of established ones. A rich and dynamic pluralism is the product of a robust right of association. Within such associations, standards of excellence and morality can be established, affirmed, and pursued in the face of competing social and economic trends. This last point was especially significant to

Tocqueville in light of the leveling tendencies of American democracy: "If [people] are to remain civilized or to become civilized, the art of association must develop and improve among them at the same speed as equality of conditions spreads." *Id.*

For Tocqueville, and surely for most Americans today, the right to associate freely in voluntary associations is fundamental. Tocqueville wrote: "The most natural right of man, after that of acting on his own, is that of combining his efforts with those of his fellows and acting together." *Id.* at 193; *see* MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS 391 (1991) ("For most [individuals], to be deprived of the right of voluntary association . . . would be a far greater and more deeply felt loss of liberty than to be deprived of the right to speak freely."). Excessive governmental regulation of voluntary associations degrades the ability of citizens to form such associations, leaving them increasingly dependent on the state: "The more government takes the place of associations, the more will individuals lose the idea of forming associations and need the government to come to their help. That is a vicious circle of cause and effect." TOCQUEVILLE, *supra*, at 515. Hence, state usurpation of the social place of voluntary associations is a direct threat to a self-governing democratic people: "The morals and intelligence of a democratic people would be in as much danger as its commerce and industry if ever a government wholly usurped the place of private associations." *Id.*

This Court's jurisprudence has been sensitive to such concerns. The Court stated in *Roberts* that the "right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends" has always been a defining characteristic of American liberty. 468 U.S. at 622. Throughout our history, that right has been "especially important in preserving political and cultural diversity and in shielding dissident expression from suppression by the majority." *Id.*

Of course, some associations are properly the subject of appropriate governmental regulation. For instance, the law has long regulated labor unions and other commercial associations to guard against serious economic disruptions. *See, e.g.*, National Labor Relations Act, 29 U.S.C. §§ 151 to 169. However, religious, cultural, and moral associations are very different from commercial associations. Regulation of voluntary, noncommercial associations—especially those, like Scouting, which are dedicated to promoting religious, cultural, and moral ends—raises the gravest constitutional and social concerns. A free and democratic polity depends on the right of voluntary associations to govern themselves—to decide what they believe and how they will advance those beliefs—free from governmental control. As interpreted by the decision below, the LAD denies that basic right to BSA and its sponsors.

CONCLUSION

For the reasons stated herein, and those contained in the brief of Boy Scouts of America, the ruling of the court below should be reversed.

Respectfully submitted,

VON G. KEETCH
Counsel of Record
ALEXANDER DUSHKU
KIRTON & MCCONKIE
1800 Eagle Gate Tower
60 East South Temple
Salt Lake City, Utah 84111
(801) 328-3600
Attorneys for Amici

February 28, 2000